

1
2
3
4
5
6
7 THELONIOUS MONK, JR.,
8 Plaintiff,
9 v.
10 NORTH COAST BREWING CO. INC.,
11 Defendant.

Case No.17-cv-05015-HSG

12
13
14
15
**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS**

16 Re: Dkt. No. 22

17 Pending before the Court is Defendant North Coast Brewing Company's motion to dismiss
18 the First Amended Complaint. Dkt. No. 10 ("FAC"). For the reasons set forth below,
19 Defendant's motion is **DENIED**.¹

20 **I. BACKGROUND**

21 **A. Factual Allegations**

22 Plaintiff is Thelonious Sphere Monk, Jr., bringing this action on behalf of the estate of his
23 father, Thelonious Sphere Monk. FAC ¶ 7. Thelonious Monk was a "pioneer of the Bebop style
24 of jazz music" who "became one of the most famous jazz musicians of all time." *Id.* ¶ 12. As an
25 artist, he "cultivated a unique look," "adopt[ing] a distinctive style in suits, hats, facial hair and
26 sunglasses." *See id.* ¶ 13. Among his numerous accolades are his claim to having composed
27 "Round Midnight," "the most recorded jazz composition of all time," *id.* ¶ 14, and holding the title
28 of "second most recorded composer of jazz music of all time, behind only Duke Ellington," *id.* ¶ 15. Monk died in New Jersey on February 17, 1982, after which Monk, Jr. was appointed the
administrator of his estate. *See id.* ¶¶ 8-9.

1 The Court finds this matter appropriate for disposition without oral argument and the matter is
deemed submitted. *See Civil L.R. 7-1(b).*

1 Defendant is a craft brewery that “[f]or many years . . . has produced, distributed, and sold
2 an ale brewed in the Trappist style called” Brother Thelonious Belgian Style Abbey Ale (“Brother
3 Thelonious”). *See id.* ¶¶ 26, 28-29. The ale’s label and packaging “prominently feature[] the
4 name, image and likeness of Thelonious Monk.” *See id.* ¶¶ 30-32. Specifically, Monk is shown
5 “holding a goblet,” “wearing his signature sunglasses, hat and facial hair” with “a halo of piano
6 keys surround[ing] Monk’s head in a manner evocative of saintly characters featured in medieval
7 religious paintings.” *Id.* ¶ 31. Defendant also “features the Monk name, image and likeness in all
8 of its advertising, marketing and sales materials” for Brother Thelonious. *Id.* ¶ 33. Additionally,
9 Defendant uses the Monk name, image, and likeness to sell Brother Thelonious and other products
10 on its website, *see id.* ¶ 34, as well as “in connection with promotional events at [j]azz festivals
11 and other locations,” *id.* ¶ 35.

12 Plaintiff alleges that it “verbally agreed” prior to this dispute to allow Defendant to use
13 Monk’s name, image, and likeness “for the limited purposes of solely marketing and distributing
14 [Brother Thelonious] in exchange for [Defendant’s] agreement to donate a portion of the profits
15 from the sale of [Brother Thelonious] to the Thelonious Monk Institute of Jazz.” *Id.* ¶ 37.
16 Plaintiff also states that Defendant has never had authorization to use Monk’s name, image, or
17 likeness “for the sale of merchandise.” *Id.* ¶ 38. In any event, on January 11, 2016, Plaintiff
18 informed Defendant that “any consent previously given” to Defendant to use Monk’s name,
19 image, or likeness in the sale of Brother Thelonious “was immediately terminated and revoked,
20 and that [Defendant] could no longer use the [Monk] name, image, and likeness without entering
21 into a merchandising agreement with” his estate. *Id.* ¶ 39. In the interim, Plaintiff “advised . . .
22 that all royalty payments must be made to The Monk Estate.” *Id.* Since then, Defendant has
23 continued to use the Monk name, image, and likeness “without permission of the Monk Estate and
24 without compensating the Monk Estate.” *Id.* ¶ 40.

25 **B. Procedural Posture**

26 Plaintiff filed the FAC on September 12, 2017. Dkt. No. 10. Defendant filed this motion
27 on November 13, 2017. Dkt. No. 22 (“Mot.”). Plaintiff filed its opposition on December 8, 2017,
28 Dkt. No. 33 (“Opp.”), and Defendant replied on December 20, 2017, Dkt. No. 35 (“Reply”).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief[.]” A defendant may move to dismiss a complaint for failing to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion, a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when a plaintiff pleads “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In reviewing the plausibility of a complaint, courts “accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nonetheless, Courts do not “accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

III. DISCUSSION

Plaintiff alleges three causes of action: (1) trademark infringement under 15 U.S.C. § 1125(a); (2) a violation of New Jersey’s common law right of publicity; and (3) unjust enrichment.² Defendant moves to dismiss the entire FAC. *See* Mot. at 4. The Court considers each argument in turn.

A. Plaintiff States a Claim for Trademark Infringement on a Theory of False Endorsement.

The parties disagree as to how to properly characterize Plaintiff’s federal infringement claim. Defendant contends that Plaintiff’s claim is that Defendant’s “marketing under the [Brother

² Plaintiff originally brought an additional claim for relief under California Civil Code § 3344.1, *see* FAC ¶¶ 56-67, but later voluntarily dismissed that claim, *see* Dkt. No. 17.

1 Thelonious] brand infringes The Monk Estate’s trademark rights” in the Brother Thelonious
2 brand. *See* Mot. at 8. Plaintiff, on the other hand, characterizes its trademark infringement claim
3 as “one of false endorsement.” Opp. at 3. While the FAC does not use the term “false
4 endorsement,” it does make clear that Plaintiff is seeking relief for Defendant’s alleged
5 infringement of the Monk name, image, and likeness—not for some asserted interest in the
6 Brother Thelonious brand itself. *See* FAC ¶¶ 48-53. Moreover, Plaintiff plainly alleges that
7 Defendant’s use of the Monk name, image, and likeness “is likely to cause confusion, mistake, or
8 deceive as to whether [Monk] or the Monk Estate is connected with, affiliated with, sponsors or
9 approves” Brother Thelonious, “and other products that feature [his] name, image and likeness.”
10 *See* FAC ¶ 51. Accordingly, the Court will treat Plaintiff’s trademark infringement claim as one
11 of false endorsement, notwithstanding the parties’ failure to engage with the relevant doctrine.

12 The false endorsement provision of the Lanham Act provides that

13 Any person who, on or in connection with any goods or services . . .
14 uses in commerce any word, term, name, symbol, or device, or any
15 combination thereof, or any false designation of origin, false or
16 misleading description of fact, or false or misleading representation
17 of fact, which . . . is likely to cause confusion, or to cause mistake,
or to deceive as to the affiliation, connection, or association of such
person with another person, or as to the origin, sponsorship, or
approval of his or her goods, services, or commercial activities by
another person . . . shall be liable in a civil action by any person who
believes that he or she is or is likely to be damaged by such act.

18 15 U.S.C. § 1125(a)(1)(A). Courts recognize false endorsement claims “brought by plaintiffs,
19 including celebrities, for the unauthorized imitation of their distinctive attributes, where those
20 attributes amount to an unregistered commercial ‘trademark.’” *Waits v. Frito-Lay, Inc.*, 978 F.2d
21 1093, 1106 (9th Cir. 1992), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control*
22 *Components, Inc.*, 134 S. Ct. 1377 (2014). To establish a claim for false endorsement, a plaintiff
23 must show that it (1) “[has] a protectable interest in the marks or trade dress at issue,” and (2) that
24 [the defendant’s] use of the marks or trade dress has created a likelihood of consumer confusion.”
25 *LifeScan, Inc. v. Shasta Techs., LLC*, No. 12-cv-06360-JST, 2013 WL 12201564, at *4 (N.D. Cal.
26 May 21, 2013). “[L]ikelihood of consumer confusion is the determinative issue,” *Cairns v.*
27 *Franklin Mint Co.*, 292 F.3d 1139, 1149 (9th Cir. 2002), and the inquiry is “predominantly factual
28 in nature,” *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1008 (9th Cir. 2001) (quoting *Wendt*

1 *v. Host Int'l*, 125 F.3d 806, 812 (9th Cir. 1997).

2 In cases involving a celebrity, this Circuit has used an eight-factor test to determine
3 whether there is a likelihood of confusion:

- 4 1. the level of recognition that the plaintiff has among the
5 segment of society for whom the defendant's product is
6 intended;
- 7 2. the relatedness of the fame or success of the plaintiff to the
8 defendant's product;
- 9 3. the similarity of the likeness used by the defendant to the
10 actual plaintiff;
- 11 4. evidence of actual confusion;
- 12 5. marketing channels used;
- 13 6. likely degree of purchaser care;
- 14 7. defendant's intent on selecting the plaintiff; and
- 15 8. likelihood of expansion of the product lines.

16 *Downing*, 265 F.3d at 1007-08. “Although all of these factors are appropriate for consideration in
17 determining the likelihood of confusion, they are not necessarily of equal importance, nor do they
18 necessarily apply to every case.” *Id.* at 1008.

19 Plaintiff has pled sufficient facts to state a claim of false endorsement. Certainly it is
20 plausible that Plaintiff—the Monk estate—has a protectable interest in the name, image, and
21 likeness of Monk. *See Kournikova v. Gen. Media Commc'ns*, 278 F. Supp. 2d 1111, 1120 (C.D.
22 Cal. 2003) (finding that famous tennis player “clearly has an interest in promoting and maintaining
23 her own mark—that is an interest in the exploitation of her name and likeness”). Moreover, the
24 alleged facts are sufficient to support a possible finding of likelihood of confusion. *See* FAC ¶¶ 30
25 (alleging that Defendant has “consistently” sold an ale “that prominently features the name, image
26 and likeness of Thelonious Monk”), 31 (alleging that ale’s packaging “features the name, image[]
27 and likeness of Thelonious Monk”), 32 (alleging that “‘BROTHER THELONIOUS’ is the
28 principal feature in large print in all the product packaging”). This is particularly true at the
pleading stage, given the fact-intensive nature of the likelihood of confusion inquiry. *See*
Downing, 265 F.3d at 1008.³

29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
2510
2511
2512
2513
2514
2515
2516
2517
2518
2519
2520
2521
2522
2523
2524
2525
2526
2527
2528
2529
2530
2531
2532
2533
2534
2535
2536
2537
2538
2539
2540
2541
2542
2543
2544
2545
2546
2547
2548
2549
2550
2551
2552
2553
2554
2555
2556
2557
2558
2559
25510
25511
25512
25513
25514
25515
25516
25517
25518
25519
25520
25521
25522
25523
25524
25525
25526
25527
25528
25529
25530
25531
25532
25533
25534
25535
25536
25537
25538
25539
25540
25541
25542
25543
25544
25545
25546
25547
25548
25549
25550
25551
25552
25553
25554
25555
25556
25557
25558
25559
25560
25561
25562
25563
25564
25565
25566
25567
25568
25569
25570
25571
25572
25573
25574
25575
25576
25577
25578
25579
25580
25581
25582
25583
25584
25585
25586
25587
25588
25589
25590
25591
25592
25593
25594
25595
25596
25597
25598
25599
255100
255101
255102
255103
255104
255105
255106
255107
255108
255109
255110
255111
255112
255113
255114
255115
255116
255117
255118
255119
255120
255121
255122
255123
255124
255125
255126
255127
255128
255129
255130
255131
255132
255133
255134
255135
255136
255137
255138
255139
255140
255141
255142
255143
255144
255145
255146
255147
255148
255149
255150
255151
255152
255153
255154
255155
255156
255157
255158
255159
255160
255161
255162
255163
255164
255165
255166
255167
255168
255169
255170
255171
255172
255173
255174
255175
255176
255177
255178
255179
255180
255181
255182
255183
255184
255185
255186
255187
255188
255189
255190
255191
255192
255193
255194
255195
255196
255197
255198
255199
255200
255201
255202
255203
255204
255205
255206
255207
255208
255209
255210
255211
255212
255213
255214
255215
255216
255217
255218
255219
255220
255221
255222
255223
255224
255225
255226
255227
255228
255229
255230
255231
255232
255233
255234
255235
255236
255237
255238
255239
255240
255241
255242
255243
255244
255245
255246
255247
255248
255249
255250
255251
255252
255253
255254
255255
255256
255257
255258
255259
255260
255261
255262
255263
255264
255265
255266
255267
255268
255269
255270
255271
255272
255273
255274
255275
255276
255277
255278
255279
255280
255281
255282
255283
255284
255285
255286
255287
255288
255289
255290
255291
255292
255293
255294
255295
255296
255297
255298
255299
255300
255301
255302
255303
255304
255305
255306
255307
255308
255309
255310
255311
255312
255313
255314
255315
255316
255317
255318
255319
255320
255321
255322
255323
255324
255325
255326
255327
255328
255329
255330
255331
255332
255333
255334
255335
255336
255337
255338
255339
255340
255341
255342
255343
255344
255345
255346
255347
255348
255349
255350
255351
255352
255353
255354
255355
255356
255357
255358
255359
255360
255361
255362
255363
255364
255365
255366
255367
255368
255369
255370
255371
255372
255373
255374
255375
255376
255377
255378
255379
255380
255381
255382
255383
255384
255385
255386
255387
255388
255389
255390
255391
255392
255393
255394
255395
255396
255397
255398
255399
255400
255401
255402
255403
255404
255405
255406
255407
255408
255409
255410
255411
255412
255413
255414
255415
255416
255417
255418
255419
255420
255421
255422
255423
255424
255425
255426
255427
255428
255429
255430
255431
255432
255433
255434
255435
255436
255437
255438
255439
255440
255441
255442
255443
255444
255445
255446
255447
255448
255449
255450
255451
255452
255453
255454
255455
255456
255457
255458
255459
255460
255461
255462
255463
255464
255465
255466
255467
255468
255469
255470
255471
255472
255473
255474
255475
255476
255477
255478
255479
255480
255481
255482
255483
255484
255485
255486
255487
255488
255489
255490
255491
255492
255493
255494
255495
255496
255497
255498
255499
255500
255501
255502
255503
255504
255505
255506
255507
255508
255509
255510
255511
255512
255513
255514
255515
255516
255517
255518
255519
255520
255521
255522
255523
255524
255525
255526
255527
255528
255529
255530
255531
255532
255533
255534
255535
255536
255537
255538
255539
255540
255541
255542
255543
255544
255545
255546
255547
255548
255549
255550
255551
255552
255553
255554
255555
255556
255557
255558
255559
255560
255561
255562
255563
255564
255565
255566
255567
255568
255569
255570
255571
255572
255573
255574
255575
255576
255577
255578
255579
255580
255581
255582
255583
255584
255585
255586
255587
255588
255589
255590
255591
255592
255593
255594
255595
255596
255597
255598
255599
2555100
2555101
2555102
2555103
2555104
2555105
2555106
2555107
2555108
2555109
2555110
2555111
2555112
2555113
2555114
2555115
2555116
2555117
2555118
2555119
2555120
2555121
2555122
2555123
2555124
2555125
2555126
2555127
2555128
2555129
2555130
2555131
2555132
2555133
2555134
2555135
2555136
2555137
2555138
2555139
2555140
2555141
2555142
2555143
2555144
2555145
2555146
2555147
2555148
2555149
2555150
2555151
2555152
2555153
2555154
2555155
2555156
2555157
2555158
2555159
2555160
2555161
2555162
2555163
2555164
2555165
2555166
2555167
2555168
2555169
2555170
2555171
2555172
2555173
2555174
2555175
2555176
2555177
2555178
2555179
2555180
2555181
2555182
2555183
2555184
2555185
2555186
2555187
2555188
2555189
2555190
2555191
2555192
2555193
2555194
2555195
2555196
2555197
2555198
2555199
2555200
2555201
2555202
2555203
2555204
2555205
2555206
2555207
2555208
2555209
2555210
2555211
2555212
2555213
2555214
2555215
2555216
2555217
2555218
2555219
2555220
2555221
2555222
2555223
2555224
2555225
2555226
2555227
2555228
2555229
2555230
2555231
2555232
2555233
2555234
2555235
2555236
2555237
2555238
2555239
2555240
2555241
2555242
2555243
2555244
2555245
2555246
2555247
2555248
2555249
2555250
2555251
2555252
2555253
2555254
2555255
2555256
2555257
2555258
2555259
2555260
2555261
2555262
2555263
2555264
2555265
2555266
2555267
2555268
2555269
2555270
2555271
2555272
2555273
2555274
2555275
2555276
2555277
2555278
2555279
2555280
2555281
2555282
2555283
2555284
2555285
2555286
2555287
2555288
2555289
2555290
2555291
2555292
2555293
2555294
2555295
2555296
2555297
2555298
2555299
2555300
2555301
2555302
2555303
2555304
2555305
2555306
2555307
2555308
2555309
2555310
2555311
2555312
2555313
2555314
2555315
2555316
2555317
2555318
2555319
2555320
2555321
2555322
2555323
2555324
2555325
2555326
2555327
2555328
2555329
2555330
2555331
2555332
2555333
2555334
2555335
2555336
2555337
2555338
2555339
2555340
2555341
2555342
2555343
2555344
2555345
2555346
2555347
2555348
2555349
2555350
2555351
2555352
2555353
2555354
2555355
2555356
2555357
2555358
2555359
2555360
2555361
2555362
2555363
2555364
2555365
2555366
2555367
2555368
2555369
2555370
2555371
2555372
2555373
2555374
2555375
2555376
2555377
2555378
2555379
2555380
2555381
2555382
2555383
2555384
2555385
2555386
2555387
2555388
2555389
2555390
2555391
2555392
2555393
2555394
2555395
2555396
2555397
2555398
2555399
2555400
2555401
2555402
2555403
2555404
2555405
2555406
2555407
2555408
2555409
2555410
2555411
2555412
2555413
2555414
2555415
2555416
2555417
2555418
2555419
2555420
2555421
2555422
2555423
2555424
2555425
2555426
2555427
2555428
2555429
2555430
2555431
2555432
2555433
2555434
2555435
2555436
2555437
2555438
2555439
2555440
2555441
2555442
2555443
2555444
2555445
2555446
2555447
2555448
2555449
2555450
2555451
2555452
2555453
2555454
2555455
2555456
2555457
2555458
2555459
2555460
2555461
2555462
2555463
2555464
2555465
2555466
2555467
2555468
2555469
2555470
2555471
2555472
2555473
2555474
2555475
2555476
2555477
2555478
2555479
2555480
2555481
2555482
2555483
2555484
2555485
2555486
2555487
2555488
2555489
2555490
2555491
2555492
2555493
2555494
2555495
2555496
2555497
2555498
2555499
2555500
2555501
2555502
2555503
2555504
2555505
2555506
2555507
2555508
2555509
2555510
2555511
2555512
2555513
2555514
2555515
2555516
2555517
2555518
2555519
2555520
2555521
2555522
2555523
2555524
2555525
2555526
2555527
2555528
2555529
2555530
2555531
2555532
2555533
2555534
2555535
2555536
2555537
2555538
2555539
2555540
2555541
2555542
2555543
2555544
2555545
2555546
2555547
2555548
2555549
2555550
2555551
2555552
2555553
2555554
2555555
2555556
2555557
2555558
2555559
2555560
2555561
2555562
2555563
2555564
2555565
2555566
2555567
2555568
2555569
2555570
2555571
2555572
2555573
2555574
2555575
2555576
2555577
25

1 For similar reasons, the Court declines to rule on Defendant's arguments against Plaintiff's
2 infringement claim at this juncture. Defendant maintains that its agreement with Plaintiff was a
3 "mere consent," rather than a "trademark license," and thus "cannot be withdrawn," precluding
4 any allegations of infringement. *See* Reply at 2. Defendant also contends that Plaintiff cannot
5 overcome the fact that the trademark registration for Brother Thelonious is incontestable. *See*
6 Mot. at 8; Reply at 8. As to the former argument—Defendant's failure to cite to Ninth Circuit
7 authority notwithstanding—the Court declines to find at the motion to dismiss stage that Plaintiff
8 could not, as a matter of law, revoke its consent, thus precluding it from making a claim of
9 trademark infringement. As with likelihood of confusion, the nature of Plaintiff's consent is a
10 fact-intensive inquiry more appropriately resolved on a more fully developed record. *See Hall v.*
11 *S. Beach Skin Care, Inc.*, No. CV 13-8905 RSWL (PJWx), 2014 WL 1330311, at *4 (C.D. Cal.
12 Apr. 2, 2014) (describing the question of consent in a false endorsement case as requiring the court
13 "to consider evidence—evidence the Court cannot consider on a motion to dismiss"). Moreover,
14 because Defendant's incontestability argument relies on its consent argument, *see* Reply at 9, the
15 Court likewise declines to address it at this stage.⁴

16 Defendant's motion is therefore denied as to Plaintiff's false endorsement claim.

17 **B. Plaintiff Pleads Sufficient Facts in Support of Its Contention That Under New**
18 **Jersey Law, Defendant Infringed Its Right of Publicity.**

19 Plaintiff next alleges a violation of New Jersey's common law right of publicity. *See* FAC
20 ¶¶ 68-78. Defendant contends that its arguments against the false endorsement claim—namely,
21 the consent and incontestability arguments—also foreclose the claim under New Jersey law. *See*
22 Mot. at 12-13; Reply at 12. Because the Court declines to engage such fact-intensive arguments at
23 the pleading stage for the reasons stated above, Plaintiff needs only to state a claim under New
24 Jersey law in order for it to survive Defendant's motion.

25
26 F.2d 1395, 1396 (9th Cir. 1992) (summary judgment); *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341,
27 345-46 (9th Cir. 1979) (bench trial), *abrogated on other grounds by Mattel, Inc. v. Walking*
Mountain Prods., 353 F.3d 792 (9th Cir. 2003).

28 ⁴ For this reason, the Court need not address Defendant's request for judicial notice of the
trademark registration for the Brother Thelonious label at this juncture. *See* Mot. at 5 n.2.

1 “The ‘right of publicity’ ‘signif[ies] the right of an individual, especially a public figure or
2 a celebrity, to control the commercial value and exploitation of his name and picture or likeness
3 and to prevent others from unfairly appropriating this value for commercial benefit.’” *McFarland*
4 *v. Miller*, 14 F.3d 912, 918 (3d Cir. 1994) (citing *Estate of Presley v. Russen*, 513 F. Supp. 1339,
5 1353 (D.N.J. 1981)). New Jersey courts “have explained the *prima facie* case for infringement of
6 the right of publicity as a two-fold requirement, including allegations of validity and
7 infringement.” *Hart v. Elec. Arts, Inc.*, 740 F. Supp. 2d 658, 665 (D.N.J. 2010) (applying New
8 Jersey law). The first prong, validity, “relates to whether the plaintiff ‘owns an enforceable right
9 in the identity or persona,’ the likeness of which he alleges was misappropriated.” *Id.* (citation
10 omitted). The second prong, infringement, requires that the defendant (1) “used some aspect of
11 [the plaintiff’s] identity or persona” without the latter’s permission, in a way that (2) renders the
12 plaintiff “identifiable” from the defendant’s use and (3) “is likely to cause damage to the
13 commercial value of that persona.” *See id.* (citation omitted); *see also Prima v. Darden Rests., Inc.*,
14 78 F. Supp. 2d 337, 350 (D.N.J. 2000) (“To allege a *prima facie* case for infringement of the
15 right of publicity, the plaintiff must show both validity and infringement.”) (citing treatise).
16 Courts have been clear that a defendant is liable “for the tort of misappropriation of likeness *only*
17 *if* defendant’s use of plaintiff’s likeness was for a predominantly commercial purpose, *i.e.*, if
18 defendant was seeking to capitalize on [plaintiff’s] likeness for purposes other than the
19 dissemination of news or information.” *Hart*, 740 F. Supp. 2d at 667 (quoting *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904, 909-10 (D.N.J. 1986)) (emphasis added). The right of
20 publicity survives the holder’s death in New Jersey. *See McFarland*, 14 F.3d at 917-18.
21

22 Plaintiff has pled sufficient facts to state a *prima facie* claim of infringement of its right of
23 publicity. As to validity, it is more than plausible that Plaintiff has a right “to control the
24 commercial value and exploitation” of Monk’s persona, and to “prevent others from unfairly
25 appropriating this value for commercial benefit.” *See McFarland*, 14 F.3d at 918. As to
26 infringement, Plaintiff alleges that Defendant is using Monk’s persona on the Brother Thelonious
27 materials without its consent—at least as of January 11, 2016. *See* FAC ¶ 39. Plaintiff further
28 alleges facts supporting the assertion that Monk is identifiable on these materials—not least

1 because of Monk's unique style, *see id.* ¶ 13, and because the name of the ale is Brother
2 Thelonious, *see id.* ¶ 32. Moreover, Plaintiff alleges that since January 11, 2016, Defendant has
3 continued to use Monk's name, image, and likeness "without compensating the Monk Estate,"
4 which is sufficient at this stage to show that Defendant's use is likely to cause damage to the
5 commercial value of Monk's persona. And, given that Defendant is using Monk's persona to
6 market and sell a beer, rather than disseminate news or information about Monk, Plaintiff has
7 sufficiently pled that Defendant's alleged infringement is for a commercial purpose.

8 Accordingly, Defendant's motion is denied as to Plaintiff's right of publicity claim.

9 **C. Plaintiff Sufficiently Pleads a Claim for Unjust Enrichment Under California
10 Law.**

11 Last, Plaintiff alleges a standalone claim for unjust enrichment under California law,⁵
12 contending that Defendant "was and continues to be unjustly enriched through unlicensed and
13 unauthorized exploitation of the name, image and likeness of" Monk. *See* FAC ¶¶ 79-85.
14 Defendant counters that "California does not recognize unjust enrichment as a separate cause of
15 action." *See* Mot. at 13.

16 It is true that there is generally "no cause of action in California for unjust enrichment."
17 *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003); *see also Astiana v. Hain
18 Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) (same). Unjust enrichment is not a "theory
19 of recovery, but an effect: the result of a failure to make restitution under circumstances where it is
20 equitable to do so." *Melchior*, 106 Cal. App. 4th at 793 (citation and internal quotation marks
21 omitted). "It is synonymous with restitution," *id.* (citation omitted), and "is typically sought in
22 connection with a 'quasi-contractual' claim in order to avoid unjustly conferring a benefit upon a
23 defendant where there is no valid contract," *Lorenzo v. Qualcomm Inc.*, 603 F. Supp. 2d 1291,
24 1307 (S.D. Cal. 2009) (citing *McBride v. Boughton*, 123 Cal. App. 4th 379, 388 (2004)). But a
25 court may also take a further step: "[w]hen a plaintiff alleges unjust enrichment, a court may

26 _____
27 ⁵ Plaintiff incorrectly asserts that "[t]he FAC sets forth a claim [of unjust enrichment] under either
28 New Jersey or California law," Opp. at 11, contrary to the FAC's plain language, FAC ¶ 85 ("The
Monk Estate is entitled to just compensation *under the common law of the State of California.*")
(emphasis added).

1 ‘construe the cause of action as a quasi-contract claim seeking restitution.’” *Astiana*, 783 F.3d at
2 762 (quoting *Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221, 231 (2014)).

3 Plaintiff asks this Court to apply the principle set forth in *Astiana* and construe its unjust
4 enrichment claim as “one in quasi-contract seeking restitution for the money earned by
5 [Defendant’s] violations of [Plaintiff’s] right of publicity.” Opp. at 10. The Court will construe
6 the cause of action accordingly. It is true that there is no action in quasi-contract “where there
7 exists between the parties a valid express contract covering the same subject matter.” *Rutherford*
8 *Holdings*, 223 Cal. App. 4th at 231 (quoting *Lance Camper Mfg. Corp. v. Republic Indem. Co.*, 44
9 Cal. App. 4th 194, 203 (1996)). But, as alleged, there is at least some period of time during which
10 no contract existed between Plaintiff and Defendant, *see* FAC ¶ 39, and for that period a quasi-
11 contract claim would not impermissibly duplicative. Moreover, because the existence of a
12 contract is a question of fact when parties are in conflict as to the facts, *see Vita Planning &*
13 *Landscape Architecture, Inc. v. HKS Architects, Inc.*, 240 Cal. App. 4th 763, 771-72 (2015), the
14 Court declines to make a finding on that point at this stage of the litigation. Given Plaintiff’s
15 allegation that Defendant continues to use Monk’s persona “without permission of the Monk
16 Estate and without compensating the Monk Estate,” *see* FAC ¶ 40, it has sufficiently pled a cause
17 of action for unjust enrichment.⁶

18 Defendant’s motion is therefore denied as to Plaintiff’s unjust enrichment cause of action.

19 //
20 //
21 //
22 //
23 //
24
25 _____
26 ⁶ In the event Plaintiff cannot prove its unjust enrichment cause of action, its proposal to construe
27 it as a remedy for its right of publicity claim under New Jersey law may be appropriate. *See* Opp.
28 at 10. In discussing the “rationales for awarding entertainers and professional athletes a right of
publicity,” the Third Circuit quoted the Supreme Court in naming “the straightforward one of
preventing unjust enrichment by the theft of good will.” *Fleer Corp. v. Topps Chewing Gum, Inc.*,
658 F.2d 139, 149 n.15 (3d Cir. 1981) (quoting *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S.
562, 576 (1977)).

IV. CONCLUSION

Accordingly, for the foregoing reasons, Defendant's motion is **DENIED**.

IT IS SO ORDERED.

Dated: 1/31/2018


HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California